Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

---

No. 81-2349

---

JAPAN LINE, LTD., Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA, Respondents.

---

# REPLY OF JAPAN LINE, LTD., TO BRIEF IN OPPOSITION OF JAMES TURNER

---

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
KENNETH E. ROBERTS
PAUL N. DAIGLE
KATHERINE H. O'NEIL
1200 Standard Plaza
Portland, Oregon 97204
Telephone: (503) 222-9981
Counsel for Petitioner

September 16, 1982

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

---

No. 81-2349

---

JAPAN LINE, LTD., Petitioner,

v.

JAMES TURNER and PHILIPPINE PRESIDENT LINES, INC., MANILA, Respondents.

---

Japan Line, Ltd., replies to the brief in opposition to its petition filed on behalf of Mr. Turner.

TABLE OF CONTENTS


| | Page |
|---|---|
| Reply to Mr. Turner's Statement of the Case ..... | 2 |
| Reply to Mr. Turner's Response on the Issue of Indemnity ..... | 5 |
| Conclusion ..... | 10 |

## INDEX OF AUTHORITIES

### Cases Cited


| | Page |
|---|---|
| D/S Ove Skou v. Hebert, 365 F.2d 341 (5th Cir. 1966) *cert. denied*, 400 U.S. 902, 91 S. Ct. 139, 27 L. Ed. 2d 139 (1970) | 6,7,9 |
| Edmonds v. Compagnie Generale Transatlantique, 558 F.2d 186 (4th Cir. 1977) reversed on other grounds, 443 U.S. 256 (1976) | 4 |
| Fernandez v. Chios Shipping Co., Ltd., 542 F.2d 145 (2d Cir. 1976) | 5,7 |
| Mallard v. Alum. Co. of Canada, 1981 AMC 2151, 634 F.2d 236 (5th Cir. 1981) | 7,8 |
| Migut v. Hyman-Michaels Co., 571 F.2d 352 (6th Cir. 1978) | 8 |
| Nitram, Inc. v. Cretan Life, 599 F2d 1359 (CA 5, 1979) | 6,8 |
| Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977) | 4 |


### Statutes Cited


| | |
|---|---|
| 28 U.S.C. § 1332 | 3 |
| LHWCA Amendments of 1972, 33 U.S.C. §§ 901 *et. seq.* (1970 Supp. II) | 9 |
| 33 U.S.C. § 905(b) | 3,4 |


### Rules Cited


| | |
|---|---|
| FRCP Rule 54(c) | 9 |

## REPLY TO MR. TURNER'S STATEMENT OF THE CASE

Mr. Turner's statement of the case is misleading and inaccurate in numerous respects. The following three points are the most egregious.

First, there was no cross claim for indemnity at trial. The following statement from Mr. Turner's brief is misleading:

> "The defendant Philippine President Lines had filed an answer to plaintiff's second amended complaint which contained a cross-claim for indemnity against petitioner. (CR 214, 215)." (Response, p. 12.)

Phillippine President Lines dropped its claim for indemnity and reserved the right to seek indemnity after trial. The case was tried on a pretrial order which contained the following description of the procedural posture of the case:

> "STATEMENT JURISDICTION AND NATURE OF THE PROCEEDINGS
>
> "This is an action for injuries alleged to be suffered

> by Turner while employed as a longshoreman on board the vessel PRESIDENT QUEZON. The Jurisdiction is granted the Court by 28 USC §1332. Turner has demanded a trial by jury. Mitsuwa Transport Co., Ltd. has been dismissed from the case by order of the Court. *Philippine reserves and is afforded the right to cross claim for indemnity against Japan after trial of Turner's claim.*" [Emphasis added] R. 393.

The trial judge entered a judgment N.O.V. holding that the defendants owed no duty under 33 USC § 905(b) to Mr. Turner for the operations of the foreign stevedore. Therefore, there was no occasion for Philippine Line to seek indemnity under its charter party with Japan Line.

Second, Mr. Turner is unusually generous in ascribing knowledge of the alleged defect in stowage to the master and crew. (Response, pp. 6-12). In fact, the trial judge held that there was no evidence from which the jury could have found that the master or crew should have

known of the defective stowage by the Japanese stevedore (R. 530-532). The Second Circuit reached the very same conclusion for the same practical reasons. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 863 (2d Cir. 1977). Same: *Edmonds v. Compagnie Generale Transatlantique*, 558 F.2d 186, 189 (4th Cir. 1977), reversed on other grounds, 443 U.S. 256 (1976). In fact, on cross examination, one of Mr. Turner's experts conceded that the inspections performed by the vessel's owners would be at most intermittent. (R. 149).

This is, however, irrelevant. Mr. Turner's third egregious error is that he argues negligence in the face of evidence that both defendants had fulfilled their duty to Mr. Turner (Response pp. 9-12). As a matter of law, under 33 USC § 905(b), neither of the

defendants is vicariously liable for the negligence of the foreign stevedore.

REPLY TO MR. TURNER'S RESPONSE ON THE ISSUE OF INDEMNITY

Mr. Turner made two fundamental errors of legal analysis in his response on the issue of indemnity. (Response, pp. 20-24).

First, there is a conflict in the circuits on this issue. The Ninth Circuit held that Japan Line must indemnify Philippine President Lines *solely* on that court's interpretation of Clause 8 of the charter party. The court adopted the reasoning of the Second Circuit in a case decided prior to the 1972 amendments to the LHWCA. *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976).

Mr. Turner cites a Fifth Circuit case allocating responsibility for *cargo damage* between an owner and a charterer

under Clause 8 for the proposition that the Fifth Circuit also uses Clause 8 to allocate responsibility for *personal injury*:

> "The most recent decision of the Fifth Circuit on this issue, *Nitram, Inc. v. Cretan Life*, 599 F2d 1359 (CA 5, 1979), puts that circuit squarely in the camp of the Second Circuit." (Response, p. 22.)

Mr. Turner suggests that this 1979 *cargo* case overrules a prior personal injury case. *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966) *cert. denied*, 400 U.S. 902, 91 S. Ct. 139, 27 L. Ed. 2d 139 (1970), held that Clause 8 does not allocate responsibility for personal injury. Mr. Turner states:

> "However, in view of the Court's subsequent decision in *Nitram, Inc. v Cretan Life*, 599 F2d 1359 (CA 5, 1979), *Hebert* can no longer be considered law in the Fifth Circuit." (Response, p. 23, fn. 3.)

The Fifth Circuit recently affirmed the principle of *D/S Ove Skou v. Hebert*,

*supra*, and noted the conflict between that case and *Fernandez v. Chios Shipping Co., Ltd., supra. Mallard v. Alum. Co. of Canada*, 1981 AMC 2151, 634 F.2d 236 (5th Cir. 1981).

In a footnote the Fifth Circuit set out the black letter conflict between that circuit and the Second Circuit:

> "* * * *D/S Ove v. Hebert*, 1966 AMC 2223, 2236, 365 F.2d 341, 351 (5 Cir. 1966), *cert. denied*, 400 U.S. 902 (1970), cited by appellees, holds that the third cited clause [Clause 8] makes a charterer responsible for the costs of cargo handling, but in and of itself does not transfer operational responsibility from the owner. (Compare *Fernandez v. Chios Shipping Co., Ltd.*, 1976 AMC 1780, 542 F.2d 145 (2 Cir. 1976) which upheld an indemnity claim by the vessel owner against the time charterer on the basis of this provision where the cause of the personal injury was directly related to loading or discharging cargo.) In light of *Skou*, this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect. * * *." 634 F.2d at 242, fn. 5.

In that same footnote, the Fifth Circuit suggests that the entire charter party be read to ascertain intent on the allocation of liability for personal injury:

> "* * * Generally, however, a time charterer, one who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise. * * *" 634 F.2d at 242.

The Sixth Circuit noted this conflict between the Fifth Circuit and the Second Circuit in *Migut v. Hyman-Michaels Co.*, 571 F.2d 352, 354 (6th Cir. 1978). That court further noted that the Second Circuit had adopted its interpretation of Clause 8 before the 1972 amendments to the LHWCA and that its decision on Clause 8 must be affected by those amendments:

> "Regardless of the extent to which the sharing between the owner and charterer of the captain's supervision may have

> shifted responsibility prior to enactment of the Longshoreman's and Harbor Workers Compensation Act (LHWCA) Amendments of 1972, 33 U.S.C. §§ 901 *et seq.* (1970 Supp. II), we believe the decision of this case is affected by the amendments." 571 F.2d at 355.

The court did not find that Clause 8 shifted responsibility from the owner to the charterer. 571 F.2d at 356.

Second, Mr. Turner misstates the procedural posture of the case. It is true as Mr. Turner states that:

> "The shipowner's answer to plaintiff's Seconded [*sic*] Amended Complaint contained a cross-claim demand for indemnity against Petitioner as charterer. (CR 214)." (Response, p. 24.)

However, it is not true as Mr. Turner then says that:

> "The Court of Appeals had authority to determine the outcome of the indemnity issue under Rule 54(c), FRCP." (Response, p. 24.)

The pleadings were superseded by a pretrial order and passed away from the

case. The contentions of the owner did not contain a demand for judgment against the charterer (R. 397). *See* discussion, *supra*, at pp. 2-3.

## CONCLUSION

For these reasons, and those contained in Japan Line's petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT, MOORE & ROBERTS
KENNETH E. ROBERTS
PAUL N. DAIGLE
KATHERINE H. O'NEIL

By _____
KATHERINE H. O'NEIL
of Attorneys for Petitioner, Japan Line, Ltd.

September 16, 1982